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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0512-CR-1149
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0501-FA-10022

September 25, 2006

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Michael Davis appeals from the sentence imposed by the trial court following his guilty plea to six counts of Criminal Deviate Conduct,[1] a class A felony, Robbery,[2] a class C felony, and two counts of Criminal Confinement,[3] a class D felony. Specifically, Davis argues that the trial court failed to articulate an aggravating circumstance adequately, failed to acknowledge one of Davis's proffered mitigators, and imposed a sentence that is inappropriate in light of the nature of the offenses and Davis's character. Finding no error, we affirm the judgment of the trial court.

FACTS

On December 18, 2004, Davis had been on a binge for seven days, drinking alcohol and smoking crack cocaine. At 10:45 p.m. that evening, Davis grabbed N.L. as she stepped from the back porch of her Indianapolis apartment. He was wearing a black knit ski mask that revealed only his eyes. He held a knife to N.L.'s throat, forced her back into her apartment, and demanded money and a vehicle. He bound her hands with a dog leash and threatened to slit her throat if any of her roommates returned home. N.L. thought that she might be able to get away if she cooperated, so she gave him her ATM bank card, her PIN number for the bank card, and the keys to her Ford Explorer. Davis then removed her eyeglasses, took her cell phone, and forced her into the back seat of her Explorer.

Davis then drove to the nearest ATM, where he withdrew $60 from N.L.'s bank account. He used the money to buy crack cocaine, proceeding to smoke it in the back seat of

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[1] Ind. Code § 35-42-4-2.

[2] I.C. § 35-42-5-1.

the Explorer. When N.L. refused to consume the drug, Davis blew crack cocaine smoke into her mouth. Davis then took his pants down and forced N.L. to place her mouth on his penis, telling her to "suck like a whore." Tr. p. 21. Davis got frustrated because he could not get an erection and then pulled up his pants. N.L. pleaded with him to let her go home because he had promised her earlier that he would not hurt her, but Davis refused.

Davis withdrew more money from N.L.'s bank account and purchased more drugs. He then smoked the crack cocaine and again forced her to perform oral sex on him in the Explorer. Again, Davis could not get an erection and told her to stop. Subsequently, Davis again visited another ATM, withdrawing more money from her bank account and using the money to purchase more crack cocaine. Davis then returned to the Explorer with another man, who offered to trade his drugs to Davis in exchange for N.L. Davis refused to trade N.L., later telling her that she should be grateful to him for refusing the trade. Davis smoked more crack and again forced N.L. to perform oral sex, but was still unable to get an erection. He then moved forward in his seat and forced her to lick his anus.

After keeping N.L. in the vehicle for several hours, Davis took her to his apartment on East 56th Street in Indianapolis. Davis watched N.L. as she used the restroom, then forced her to remove all of her clothes except for her socks. Davis ordered N.L. to kneel and to place her mouth on his penis. He got angry when he could not maintain an erection, but promised that he would not rape her if she continued to perform oral sex on him. Davis then

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[3] I.C. § 35-42-3-3.

spanked N.L., forcing her to perform additional oral sex. After he ejaculated in her mouth and on her chest, Davis wiped up his semen with a sweatshirt.

Davis bound N.L. to his couch with the dog leash and bound her hands to his with a shoestring so that he would know if she moved while he slept. Davis then slept for a short time and, upon waking, again forced her to perform oral sex on him. After telling N.L. that she was not performing adequately, Davis inserted his fingers into her rectum. He then inserted his penis into N.L.'s rectum and ejaculated inside of her. Davis instructed N.L. to use the restroom and to shower in an attempt to dispose of his genetic material.

Davis next covered N.L.'s head and forced her back into the Explorer so that he could withdraw more money from her bank account. The ATM, however, declined Davis's attempts to withdraw more money. N.L. suggested that he could pawn a ratchet set she had in the vehicle for additional cash. At some point during the evening, N.L. had managed to reclaim her cell phone, and while Davis was inside the pawnshop, N.L. used her cell phone to call the police. She was disoriented, however, and was unable to give the 911 dispatcher her location. N.L. then used the cell phone to call one of her friends, but was unable to give her precise location before Davis returned.

When Davis left the Explorer again, N.L. saw that the keys were in the ignition, and, after confirming that he was not watching her, she drove away. She used her cell phone to coordinate with her friend, eventually calling the police once her friend had found her. Davis had confined and assaulted N.L. for a total of fifteen hours. A forensics examination was performed on N.L. at Methodist Hospital, which later confirmed that a semen sample found

on one of N.L.'s socks belonged to Davis. N.L. identified Davis from an array of photographs.

On January 1, 2005, the State charged Davis with six counts of class A felony criminal deviate conduct, class C felony robbery, and two counts of class D felony criminal confinement. At Davis's initial hearing on January 26, 2005, Davis proclaimed in open court that "I didn't do it." Tr. p. 74. On October 11, 2005, Davis told a court-appointed psychologist that "[t]hey have me confused with someone else . . . a black guy that's in here." Appellant's App. p. 95, 98. Davis also attempted to disguise his handwriting for an exemplar ordered during the discovery process. Discovery proceeded to the point where N.L.'s deposition was taken by Davis's attorney. On August 9, September 20, and October 18, 2005, Davis rejected the State's offers of a plea bargain. The serology report confirming that the semen found on N.L.'s sock belonged to Davis was discovered on September 20, 2005, and Davis accepted the State's offer of a plea bargain on October 24, 2005.

Pursuant to the plea agreement, Davis agreed to plead guilty to all charges. The agreement provided that the trial court could impose an executed sentence of up to ninety years of incarceration. At the sentencing hearing on November 23, 2005, the trial court afforded minimal mitigating weight to Davis's guilty plea, which spared N.L. from a public trial and spared the State the expense of a trial. The trial court refused to consider Davis's remorse or history of drug addiction as mitigating circumstances. The trial court found Davis's substantial criminal history and the nature and circumstances of the crime to be aggravating factors.

Finding that the aggravators outweighed the mitigators, the trial court sentenced Davis to thirty years for each of the six counts of class A felony criminal deviate conduct, with counts one through four to be served concurrently and counts five and six to be served consecutively. The trial court also sentenced Davis to four years for class C felony robbery and to one and one-half years for each of the class D felony criminal confinement charges, ordering Davis to serve those sentences concurrently with his sentences for criminal deviate conduct, for a total of ninety years executed. Davis now appeals.

DISCUSSION AND DECISION

Davis argues that the trial court erred in failing to articulate the aggravating factors adequately and in refusing to consider a proffered mitigator. As we consider these arguments, we observe that sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of discretion. Krumm v. State, 793 N.E.2d 1170, 1186 (Ind. Ct. App. 2003). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.[4]

In a sentencing statement, a trial court must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). A trial court is not obligated to weigh a mitigating factor as heavily as the defendant requests. Smallwood v.

[4] There some uncertainty about the requirements, if any, with which trial courts' sentencing statements must comply following the General Assembly's April 25, 2005, amendment of Indiana Code section 35-50-2-1.3. See, e.g., Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), trans. pending. But inasmuch as Davis committed the instant offenses nearly five months before the amended statute went into effect, the amended

State, 773 N.E.2d 259, 263 (Ind. 2002). A single aggravating factor may support the imposition of a consecutive sentence. Payton v. State, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004), trans. denied.

Turning first to the aggravating factors found by the trial court, we observe that Davis does not contest the propriety of his criminal history as an aggravator. Davis's criminal history consists of convictions for armed robbery, auto theft, invasion of privacy, battery, resisting law enforcement, public indecency, public intoxication, and criminal mischief. This lengthy and substantial criminal history is, alone, enough to justify the sentence imposed by the trial court.

As to the other aggravating factor—the nature and circumstances of the crime—found by the trial court, Davis argues that the trial court did not sufficiently articulate the specific facts leading to its consideration of this aggravator.[5] At the sentencing hearing, the trial court observed as follows:

> But I think the most aggravating things of all are the facts that relate to the nature and circumstances of this crime. . . .
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> . . . I'm torn between stating some of the aggravating facts about the crime and put [sic] [N.L.] to listening to them. But suffice to say that despite [the fact that] you were charged with six counts, I counted seven in the factual basis, charges of criminal deviate conduct or acts involving everything from forced oral sex to anal sex and other things

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version of the statute does not apply to him. White v. State, 849 N.E.2d 735, 742-43 (Ind. Ct. App. 2006). Moreover, the application of the amended sentencing statute would not change the result here.

[5] Although Davis does not argue about the general propriety of this aggravating factor, we note that our Supreme Court recently held that the nature and circumstances of a crime is a proper aggravator if it is based on facts found by a jury or admitted to by the defendant. Haas v. State, 849 N.E.2d 550, 554 (Ind. 2006). Here, because Davis pleaded guilty as charged, he has admitted to the relevant underlying facts. Tr. p. 19-28 (factual basis of guilty plea). Consequently, the trial court properly considered this aggravating factor.

> that, frankly, are just too despicable to speak of. So, I'll let the probable cause speak for itself.

Tr. p. 84-85. Davis argues that the trial court may not "make an unspecified reference to the nature and circumstances of the case nor can she let the probable cause affidavit speak for itself. An effort to spare the victim from further trauma while admirable cannot be at the expense of the due process rights of the defendant." Appellant's Br. p. 11.

Davis cites no authority for the proposition that the trial court is not entitled to let the probable cause affidavit speak for itself, and, indeed, our research has led us to the opposite conclusion. See Noojin v. State, 730 N.E.2d 672, 678-79 (Ind. 2000) (finding no abuse of discretion where the trial court referenced the presentence report in lieu of listing all of the defendant's criminal history). The probable cause affidavit was included in the record of proceedings and, therefore, the facts contained in that document were known to Davis. At the sentencing hearing, the trial court observed that Davis forced N.L. to have oral and anal sex, also referencing other "despicable" aggravating facts referred to in the probable cause affidavit. Tr. p. 84-85. Among those despicable facts are that Davis forced N.L. to lick his anus, that he promised not to rape her but then forced her to have anal sex, that he bound her with a dog leash, that he forced her to kneel before him, and that his confinement of and assaults on N.L. took place over the course of fifteen hours. Appellant's App. p. 22-25. We are persuaded, given the trial court's statements at the sentencing hearing and its reference to the facts contained within the probable cause affidavit, that the trial court sufficiently articulated the facts supporting its conclusion that the nature and circumstances of the crime were an aggravating factor.

Davis next argues that the trial court erred in refusing to consider his mental health and history of drug addiction as a mitigating circumstance. The trial court considered this proffered mitigator but ultimately decided not to afford it any mitigating weight, explaining its decision as follows:

> With respect to his medical history, what strikes me about the medical history is that unlike many of the drug-addicted defendants that I see, Mr. Davis knew exactly where to go, he knew exactly how to get help. And yet, time after time after time—I show admissions on the following dates at Fairbanks Hospital: July 5th, July 5th [sic], '01; 12-25-02; April 28th, '03; July 23, '03; December 23rd, '04; December 19th, '04. The bottom line is time after time, despite by his report breaking his son's heart, ruining his marriage, losing jobs, the defendant continued to choose to use. That was his choice.
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> . . . I reject the mitigation of his medical history because of the number of opportunities he had for treatment. Including, I should say again, most recently there was the Salvation Army admission in December of '02. During the course of those treatments, it's revealed in the records, that he would[,] while an outpatient[,] use [drugs]. And while they suspected use, he would not admit to it. Then when confronted about it, he'd be angry with them for confronting him about it.

Tr. p. 82-83. The trial court also considered the reports of two court-appointed mental health experts, both of whom found that Davis was competent to stand trial. Appellant's App. p. 95, 100.

It is apparent that the trial court considered this proffered mitigator, but found that it was not significant. This finding was within the trial court's discretion. Rose v. State, 810 N.E.2d 361, 366-67 (Ind. Ct. App. 2004); see also Hildebrandt v. State, 770 N.E.2d 355, 363 (Ind. Ct. App. 2002) (finding that defendant's drug addiction was an aggravator, not a mitigator). There is no evidence in the record supporting Davis's argument that he suffered

from any mental health problems that played a role in the commission of the instant offenses. The trial court explained, in detail, its reasons for refusing to afford mitigating weight to Davis's history of drug addiction, and we find its analysis to be extremely persuasive. Thus, Davis's argument must fail.

Finally, Davis argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character. Ind. Appellate Rule 7(B).[6] Turning first to the nature of Davis's offenses, we observe that Davis held N.L. captive for fifteen hours, forcing her to submit to acts that were intended to denigrate her human dignity, including numerous occasions of oral sex, forcing her to lick his anus, ejaculating on and in her, making her kneel before him, forcing her to have anal sex, and binding her like a dog. Although we attempt to avoid hyperbole, we must agree with the trial court's conclusion that Davis "torture[d]" N.L. Tr. p. 86. It is apparent to us that, contrary to Davis's argument, this appalling conduct is easily characterized as being among the worst offenses. See Brown v. State, 760 N.E.2d 243, 245 (Ind. Ct. App. 2002) (holding that the maximum sentence enhancement should be reserved for the very worse offenses and offenders).

As to Davis's character, we again turn to his extensive criminal history, which spans over two decades and includes eight convictions. Thus, Davis has demonstrated a marked disrespect for and refusal to learn from his previous contacts with the criminal justice system. Moreover, we take note of Davis's long history of drug and alcohol abuse, observing that

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[6] Our Supreme Court recently held that a defendant who enters into a capped plea agreement is entitled to a Rule 7(B) review to determine whether the sentence imposed by the trial court was inappropriate. Childress

Davis has abused, among other things, alcohol, heroin, powdered cocaine, crack cocaine, and Oxycontin. He has refused to take advantage of numerous treatment opportunities and has continued to use drugs even though he overdosed several times, lost jobs, lost his wife, and, according to his own statement, broke his son's heart. It is clear, therefore, that Davis has chosen to continue to abuse drugs, disregarding the personal and legal consequences of his drug use. Finally, the trial court aptly noted Davis's lack of remorse, self-absorption, and profound selfishness. It is apparent to us, therefore, that the sentence imposed by the trial court is not inappropriate in light of the nature of the offenses and Davis's character.

The judgment of the trial court is affirmed.

SULLIVAN, J., and MAY, J., concur.

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v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). Thus, Davis is entitled to raise this argument notwithstanding the plea agreement into which he entered with the State.